

**United States Department of Labor
Employees' Compensation Appeals Board**

S.G., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Albuquerque, NM, Employer**

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**Docket No. 17-0175
Issued: June 15, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2016 appellant filed a timely appeal from a May 5, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from April 18, 2014, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 20, 2013 appellant, then a 49-year-old recreational assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2013, she sustained a

¹ 5 U.S.C. § 8101 *et seq.*

headache, shoulder stiffness, and a nosebleed as a result of a rear-end collision between vehicles while in the performance of duty.

By letter dated March 19, 2014, OWCP advised appellant that the evidence of record was insufficient to support her claim. It noted that it had not received any medical evidence from a physician in support of her claim. OWCP afforded appellant 30 days to submit additional evidence to the record. The March 19, 2014 letter was mailed to appellant's address of record.

In reports dated December 19, 2013, January 17 and 20, 2014, chiropractors noted that appellant had developed headaches and a cervical sprain/strain.

Appellant submitted notes from physical therapists dated between January 2 and 30, 2014.

In a diagnostic report dated January 29, 2014, Dr. Sinclair Cottingham, a Board-certified radiologist, examined the results of an x-ray of appellant's cervical spine. He provided an impression of moderate-to-severe cervical spondylosis and straightening of cervical lordosis.

Appellant submitted a note from a certified physician assistant dated January 29, 2014.

In a diagnostic report dated March 18, 2014, Dr. Anthony Larhs, a Board-certified radiologist, examined the results of a magnetic resonance imaging (MRI) scan of appellant's cervical spine. He noted right foraminal disc herniation at C5-6, in addition to degenerative changes.

On April 17, 2014 appellant submitted a letter requesting a change of address.

By decision dated April 18, 2014, OWCP denied appellant's claim. It noted that appellant had not submitted any medical evidence from a physician containing a medical diagnosis causally related to her claimed employment injury. The April 18, 2014 decision was mailed to appellant's new address.

On May 22, 2014 OWCP received additional medical evidence from Dr. Greg S. Carrol.² In a report dated January 29, 2014, Dr. Carrol noted that appellant "sustained an injury to the cervical spine during a work-related [motor vehicle accident]." He examined her head and neck, finding tenderness to paraspinal muscles and a positive Spurling's test in the left arm. Dr. Carrol diagnosed cervical strain. On April 16, 2014 he assessed appellant with "neck pain." In a report dated April 18, 2014, Dr. Carrol again assessed appellant with neck pain, and noted that the problem began four to six months before that date.

On June 25, 2014 OWCP received a report dated January 30, 2014, from Dr. Brian Wilkins, a chiropractor, who noted that spinal subluxation was present.

By form dated February 9, 2016, received by OWCP on February 16, 2016, appellant requested reconsideration. On reconsideration, she included a narrative statement, arguing that

² Dr. Carrol's certification in a medical specialty could not be confirmed.

she had not received relevant mail from OWCP relating to her case, including the development letter of March 19, 2014.

By decision dated May 5, 2016, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁵ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). OWCP's procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate."

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹² In order to demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³

ANALYSIS

The Board finds that in its May 5, 2016 decision, OWCP properly determined that appellant had failed to file a timely application for review.¹⁴ Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision by OWCP.¹⁵ Appellant's request for reconsideration was received on February 16, 2016, which was more than one year after the April 18, 2014 merit decision. Therefore, she must demonstrate clear evidence of error on the part of OWCP in issuing its April 18, 2014 decision.

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in issuing its April 18, 2014 decision. She did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed an error.

In her request for reconsideration, appellant included a narrative statement alleging that she had not received correspondence from OWCP relevant to her case, as she had changed her address. The case record contains her request for a change of address, dated April 17, 2014. The decision of April 18, 2014 was sent to the new address. OWCP's development letter of March 19, 2014 was sent to her previous address, but OWCP was not notified until April 17, 2014 of the address change. As such, the allegation that she did not receive the development letter was not an error on the part of OWCP.

Moreover, a review of the medical evidence submitted to the record after the decision of April 18, 2014 does not demonstrate that OWCP committed error when it denied her claim as not establishing the medical component of fact of injury.

Following OWCP's April 18, 2014 decision OWCP received several reports from Dr. Carrol wherein he noted appellant's symptoms, including neck pain. In a report dated January 29, 2014 he diagnosed cervical strain. OWCP also received an April 16, 2014 report from a chiropractor who noted that appellant had spinal subluxation. These reports did not

¹² See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ The Board notes that the cover page of the May 5, 2016 decision incorrectly stated that OWCP reviewed the merits of appellant's case under 5 U.S.C. § 8128. However, as the decision itself applied the clear evidence of error standard, the Board will apply the correct clear evidence of standard in this appeal. See *G.F.*, Docket No. 07-1385 (issued December 11, 2007).

¹⁵ 20 C.F.R. § 10.607(a).

provide a detailed description of the accepted incident, and neither established causal relationship nor raised a substantial question as to the correctness of OWCP's decision. As previously noted, even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.¹⁶

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's April 18, 2014 decision. Thus OWCP properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See *G.M.*, Docket No. 17-0149 (issued May 11, 2017).